No. 82-1840

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

HENRY J. KIRKSEY, *et al.*,
Appellants,

v.

STATE OF MISSISSIPPI
and
UNITED STATES OF AMERICA,
Appellees.

On Appeal From The United States District Court For The District Of Columbia

MOTION TO DISMISS OR AFFIRM

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STATEMENT OF THE CASE

On June 30, 1982 the State of Mississippi submitted to the Attorney General of the United States for preclearance under Section 5, S.B. 2430 and H.B. 315, reapportionment plans for the State Senate and House of Representatives. By letter of August 24, 1982, the Attorney General requested that the State provide more information.

The State leadership and counsel determined that if an additional 60 days elapsed before the Attorney General rendered a decision, and if preclearance were then denied, the State would not have enough time to obtain a declaratory judgment before the election filing periods opened. In order to set the litigation in motion, the State

filed a declaratory judgment action on September 20, 1982. Meanwhile, the State supplied additional information to the Attorney General.

On November 18, 1982 the appellants filed a motion to intervene in the suit. While this motion was pending, the Attorney General advised the State on November 22, 1982, that he would interpose no objection to S.B. 2430 and H.B. 315. Insofar as no controversy existed between the parties, the State and the Department of Justice filed a joint motion to dismiss the case as moot. On January 12, 1983, the District Court granted the motion to dismiss and denied appellants' motion to intervene.

THIS APPEAL PRESENTS NO SUBSTANTIAL QUESTION

I. Insofar As The Appellants Lack Standing To Contest The Dismissal Below, This Appeal Must Be Dismissed For Want Of Jurisdiction.

It is well-established that one whose application to intervene is denied may not appeal from any subsequent order in the proceeding. *Brotherhood of Railroad Trainmen* v. *Baltimore and Ohio Railroad Company*, 331 U.S. 519 (1947). This rule flows naturally from the circumstance that a disappointed intervenor is not a party to the action and hence lacks standing to appeal any issue but the denial of intervention. In *Weiser* v. *White*, the Court of Appeals for the Fifth Circuit held that if the appellate court finds either that the claim of right to intervene was without merit or that the request for permissive intervention was denied without an abuse of discretion, the appellate court has no jurisdiction to review the action and the appeal must be dismissed. 505 F.2d 912 (5th Cir. 1974), *cert. denied*, 421 U.S. 993 (1975).

In the present case, the appellants lack standing to argue that the district court erred in dismissing the suit. Absent this essential prerequisite, this Court lacks jurisdiction to review the issue of the dismissal below.

II. The Dismissal Of The Action Below Renders Moot An Appeal From The Order Denying Intervention.

As a general rule, a prerequisite of intervention, which is an ancillary proceeding in an already instituted suit, is an existing suit within the court's jurisdiction. *Noncommissioned Officers' Association of the United States of America* v. *Army Times Publishing Company*, 637 F.2d 372 (5th Cir. 1981). In *Horn* v. *Eltra Corporation*, 686 F.2d 439 (6th Cir. 1982), the E.E.O.C. appealed from the denial of its motion to intervene. During the pendency of the appeal of that motion, the underlying action was dismissed with prejudice pursuant to a settlement between the parties. The Court of Appeals for the Sixth Circuit dismissed the appeal of the intervention motion as moot since no suit remained in which the appellants could intervene.

The court, however, did recognize two exceptions to the general rule that intervention requires a pending suit within the Court's jurisdiction. First, intervenors with an independent basis for jurisdiction may be treated as stating a wholly separate claim, and second, intervenors who become members of a class action may be permitted to proceed with the action even though the claim of the named parties has become moot. *Horn*, 686 F.2d at 440.

In the present case, there is no existing controversy in which Senator Kirksey and the other appellants can intervene, insofar as the action below has been dismissed. Furthermore, neither of the two exceptions apply to this situation. The defendant-intervenors have no independent basis for jurisdiction in an action against the State of Mississippi under Section 5 in the District Court for the District of Columbia.

The Voting Rights Act automatically suspended the operation of voting laws enacted by covered jurisdictions

after November 1, 1964. *South Carolina* v. *Katzenback*, 383 U.S. 301, 335 (1966). Section 5 of the Act permits a state to defeat the automatic suspension by obtaining federal approval of any new enactment. If federal authorities — either a three-judge court in Washington, D.C. or the Attorney General — find that the change does not have the purpose or effect of discriminating against minorities in the exercise of the electoral franchise, the State is free to implement the change. Consequently, "a state or political subdivision wishing to make use of a recent amendment to its voting laws . . . has a concrete and immediate 'controversy' with the Federal Government." *Katzenback*, 383 U.S. at 334. Since the dispute between the State of Mississippi and the United States regarding S.B. 2430 and H.B. 315 has been resolved, neither the appellants nor any private party can independently invoke the unique jurisdiction of the District of Columbia District Court.[1]

The second exception to the principle that a pending lawsuit is a necessary prerequisite to intervention obviously cannot apply in this instance. No class certification has been or could be sought by the parties. Thus, the appellants could not continue, as members of the same class, in the place of a named party.

City of Dallas v. *United States*, 482 F.Supp. 183 (D.D.C. 1980) presented a case similar to the one now before the Court. The city had filed a declaratory judgment action regarding an electoral plan. While the action

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[1] In one of the seminal Supreme Court cases interpreting Section 5, the Court said:

> "Once the State has successfully complied with the § 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by § 5." *Allen* v. *State Board of Elections*, 393 U.S. 544, 549 (1969).

was pending, the city council repealed the plan in question and enacted a new electoral scheme. This new plan was submitted to the Attorney General and precleared under Section 5. The City of Dallas then moved to dismiss for mootness.

The intervenors in the declaratory judgment suit opposed dismissal, contending that the court should evaluate the new plan. The court, however, found that it had no jurisdiction to entertain the suit after the controversy between the City and the Federal Government had been settled. While acknowledging the right of the intervenors to file an injunctive or constitutional action in the local federal court, the court stated:

> Nothing in the Act, however, vests this court with jurisdiction to retain a moot case to accommodate the intervenors quest for a forum in which to test a voting plan that has already been approved by the Attorney General under § 1973c *supra*. 482 F.Supp. at 186.

Similarly, in *Commissioners Court of Medina County, Texas* v. *United States*, 683 F.2d 435 (D.C. Cir. 1982), a new redistricting plan was submitted to the Attorney General and precleared, while a declaratory action regarding an earlier plan was pending before a three-judge court. The district court dismissed the suit for mootness. In an appeal of an application for attorney fees in the context of whether an intervenor could be a "prevailing party" in an action which had been dismissed as moot, the Court of Appeals commented:

> Although by the grant of intervention he has become a party, by statute he [the intervenor] is precluded from having any actual impact on the approval or disapproval of what appellees here call a "compromise plan" submitted to the Attorney General in the course of litigation. The Defendant-Intervenor is

> thus powerless to participate in any meaningful way in any "settlement" or "compromise" negotiations.
>
> A Defendant-Intervenor cannot withhold approval of the plan in the hopes of receiving terms more favorable to his interests. 683 F.2d at 440.

This language from *Medina County* and the Court's opinion in *City of Dallas* conclusively demonstrate that an unsuccessful defendant-intervenor in a Section 5 suit cannot appeal from a denial to intervene in a case which has become moot.

The Voting Rights Act deprives covered States of the right to implement their validly enacted legislation which affects voting. From this suspension results a statutorily-created controversy between the State and the Federal Government. Both the parties and the subject matter of the dispute are prescribed by statute. The statutory impediment to implementation of a state law can be overcome either by a declaratory judgment or an administrative preclearance. Either procedure dissolves the conflict. In this instance, the November 22, 1982 objection letter from the Attorney General resolved the dispute between the parties regarding the implementation of S.B. 2430 and H.B. 315. Thereafter no controversy existed over which the district court could exercise jurisdiction and consequently no case existed in which the appellants could intervene.

III. Insofar As The Interests Of The Appellants Are Both Identical With Those Of The Attorney General, And Adequately Represented By Him, The District Court Did Not Abuse Its Discretion In Denying Intervention.

The appellants have argued that they were entitled to intervene as of right in the case below, pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. Neither the text of Rule 24(a)(2) nor the case law regarding intervention in Section 5 suits support this contention.

Rule 24(a)(2) provides for intervention as of right when the applicant claims an interest relating to the subject of the litigation and that his ability to protect that interest may be impaired by the disposition of the action. In addition, the applicant must show that his interest is not adequately represented by the existing parties.

The appellants here, as black voters of Mississippi, undoubtedly have an interest in the Section 5 litigation instituted by the State. However, that is the only part of the three-part test prescribed in Rule 24(a)(2) which they can pass.

The appellants claim that preclearance of the State's reapportionment plans will impair their ability to protect their interests. In a subsequent suit instituted by them, they contend, a local federal court would always give deference to the Attorney General's determination. This argument entirely miscontrues the overall structure of the Voting Rights Act. Section 5 sets-up an automatic federal review of all reapportionment legislation so that a potentially discriminating change will be discovered and rejected before it is implemented. This preclearance requirement removes the burden of litigation from private litigants like the appellants and places it on the covered states. This initial determination by the Attorney General or the District of Columbia court, however, is not conclusive on the issue of constitutionality and it is not binding on private parties. The statute itself reserves to private litigants the right to challenge a precleared plan in local federal court.[2] In *Morris* v. *Gressette* this

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[2] "Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. 42 U.S.C § 1973c.

Court wrote: "Where the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation." 432 U.S. 491, 507 (1977). This provision of the statute highlights the absurdity of the appellants' argument that their ability to protect their interests is impaired because preclearance forecloses any opportunity to win a subsequent constitutional challenge.

In *United States* v. *National Bank and Trust Company of Central Pennsylvania*, stockholders of defendant Trust Company moved to intervene as of right in an antitrust suit instituted by the United States, in order to oppose a settlement between the parties. 319 F.Supp 930 (E.D. Pa. 1970). The movants argued that a settlement between the United States and the defendant banks would deprive them of *prima facie* evidence of antitrust violations in their civil treble damages suit. The Court ruled that the movants' interest was unimpaired and adequately protected in the separate action for damages.

Under similar factual circumstances, in *United States* v. *Auto Manufacturers Association*, 307 F.Supp. 617 (C.D. Cal. 1969), *aff'd*, 397 U.S. 248 (1970), the court explained:

> We know of no authority . . . which would require the Government to prosecute this case to judgment solely for the purpose of aiding treble damage claimants. The Government is the designated representative of the public, and sound policy requires that it be free to conduct and control its litigation in the public interest. 307 F.Supp. at 619.

Finally, *United States* v. *Louisiana*, 90 F.R.D. 365 (E.D. La. 1981) was an action brought by the United States challenging, on racial grounds, the operation of the state university system. The potential intervenor was a

black faculty member at one of the predominantly black campuses. She claimed that if intervention were denied her interests would be impaired by *stare decisis* and by the necessity of having to bring another suit. The court denied intervention finding that the movant had no interests which were not susceptible to remedy outside the pending case, should she be dissatisfied with its outcome. Moreover, the court found that there was no real potential for impeding her ability to protect her interests.

In the instant case, the appellants have a statutorily preserved right to institute a second suit. The Attorney General's preclearance has no legally binding effect on them, and no *stare decisis* effect in a *de novo* constitutional action. They cannot claim that denial of their intervention petition inhibits their ability to protect their interests.

Rule 24(a)(2) requires that intervenors as of right show that their interest is not adequately represented by the existing parties. The interests of the appellant in a nondiscriminatory reapportionment is identical with that of the United States. The case against intervention is even stronger where a federal government body or officer is a necessary party, for it is presumed that the United States adequately represents the public interest with which it is entrusted.

In *United States* v. *Board of School Commissioners of the City of Indianapolis*, 466 F.2d 573 (7th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973), the Attorney General filed a desegregation suit against a school board. On a motion to intervene by black individuals the court stated that the Attorney General is specifically charged with representing the interests of the black students and parents and that that representation was adequate. "Representation is adequate if no collusion is shown between the

representative and an opposing party, if the representative does not have or represent an interest adverse to the proposed intervenor, and if the necessary representative does not fail in the fulfillment of his duty." 466 F.2d at 575.

Under Section 5, the Attorney General is specifically charged with representing the black voters of the litigating or submitting state. Thus, the appellants' interests are adequately represented absent collusion or bad faith by the Attorney General. The appellants cavalierly suggest that their rights have been "bargained away" by agreement between Mississippi and the United States in this case.[3] Jurisdictional Statement at 8. However, in *Donnell* v. *United States*, 682 F.2d 240 (D.C. Cir. 1982), the Court determined that the sole interest of both the Attorney General and black voters in a Section 5 proceeding was in preventing a dilution of black voting strength. The court stated that they would "not lightly infer that the Justice Department has violated this statutory obligation." 682 F.2d at 247. See also, *Morris* v. *Gressette*, 432 U.S. 491 (1977) at n. 23.

The appellants contend that in fact their "interests" differ from the Attorney General's in this case because the Attorney General precleared a plan they dislike. However, in *Board of School Commissioners*, *supra*, the court took a more narrow view of what constitutes differing "interests" under Rule 24.

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[3] This suggestion is ludicrous in light of the long history of vigorous litigation between the State and the United States regarding the apportionment of the Mississippi State Legislature. The plans precleared in 1982 by the Attorney General are substantially similar to those plans approved by the District Court for the District of Columbia in 1979, which judgment was affirmed by this Court. *Mississippi* v. *United States*, 490 F.Supp. 569 (D.D.C. 1979), *aff'd* 444 U.S. 1050 (1980).

> That [intervenors] would have been less prone to agree to the facts and would have taken a different view of the applicable law does not mean that the [defendants] did not adequately represent their interests in the litigation. 466 F.2d at 575.

And in *United States* v. *International Telephone & Telegraph Corp.*, 349 F.Supp. 22 (D. Conn. 1972), an antitrust enforcement action instituted by the United States in which private citizens sought to intervene, the court noted: "[A] mere showing that the Justice Department failed to agree with the movants' version of proper antitrust policy falls wide of proof that the public was not adequately represented." 349 F.Supp. at 27.

The appellants in this case were adequately represented by the Attorney General. The purpose and function of Section 5 was to have the Attorney General assume the burden of litigation in the place of black voters. *Beer* v. *United*, 410 U.S. 425 (1976). Any disagreements the appellants have with the Attorney General's interpretation of the law or with the application of Section 5 to the facts of this case are irrelevant to the question of adequate representation under Rule 24(a)(2).

In sum, the ability of the appellants to protect their rights and interests in a constitutional challenge in Mississippi is not impaired by denial of intervention. Moreover, the interests of the appellants and the Attorney General are identical and the appellants cannot make a showing of collusion or bad faith on the Attorney General's part. Therefore, the appellants were not entitled to intervene as of right in the action below.

As a final comment on intervention as of right, it is interesting to note that shortly after the enactment of the Voting Rights Act, a three-judge court for the District of Columbia found that intervention was not permitted in a

Section 4 declaratory judgment action to reinstitute a test or device. *Apache County* v. *United States*, 256 F.Supp. 903 (D.D.C. 1966). Using the test of Rule 24 prior to its 1966 amendment, the court found that no decree in the suit could have the effect of legally binding or concluding the rights of the movants in any action to enforce their individual rights. 256 F.Supp. at 907. Under the pre-1966 rule a potential litigant had to show that he would be "legally bound" by the decree in the case.

The District of Columbia Courts have not heeded the caution of Judge Levanthal in *Apache County*, but have rather liberally granted permissive intervention. In recent actions for attorneys fees by defendant-intervenors, however, the Court of Appeals has reevaluated and applauded the wisdom of this early decision. In *Donnell* v. *United States*, 682 F.2d 240 (D.D.C. Cir. 1982), the court quoted *Apache County* as follows:

> Congress assigned to the Attorney General the primary role in vindicating the public interest under the Act. We should be reluctant indeed to permit intervention . . . in the absence of a plausible claim that the Attorney General is not adequately performing his statutory function . . . . 682 F.2d at 246, quoting *Apache County*, 256 F.Supp. at 908.

IV. When The Attorney General Acts In His Capacity To Administratively Preclear Voting Legislation Submitted To Him In Conformance With 28 C.F.R. §§ 51.25 *et. seq.*, His No-Objection Letter Renders Moot A Pending Declaratory Judgment Action Regarding The Same Or Superseded Legislation.

The appellants have argued that this Court's opinion in *City of Port Arthur* v. *United States* mandates that once the declaratory judgment action is commenced, the Attorney General cannot grant a preclearance. 103 S.Ct. 530 (1982). The appellants, however, have entirely mis-

read *Port Arthur* and failed to distinguish it from the case at bar.

In *Port Arthur*, the city instituted a Section 5 suit after the Attorney General has interposed an objection to the submission of an at-large electoral plan following an annexation. The complaint was amended and a second plan which contained some single member districts was proposed to the court. The court denied declaratory relief to the city. Thereafter the city and the Attorney General together offered a new electoral plan to the district court. The court held, and this Court affirmed, that it was not required to enter a declaratory judgment based on the parties' joint advocacy of the plan.

In the present case, the legislative reapportionment plans were submitted to the Attorney General in conformance with the Justice Department regulations 28 C.F.R. §§ 51.25 *et seq.* The Attorney General thereafter issued a no-objection letter based on the State's completed submission. The distinction between this situation and *Port Arthur* was pointed out by this Court in the *Port Arthur* opinion. "*Preclearance* by the Attorney General may obviate a court suit, but here the Attorney General was acting in the capacity of a litigant when it joined the City in submitting a plan for the courts' consideration." 103 S.Ct. at 534, n. 5. (emphasis added).

When the Attorney General advised the state that he would interpose no objection to Mississippi's legislation, he was acting within the scope of his statutory function to grant administrative preclearance under Section 5. Once the preclearance was granted, the case pending before the district court was moot.

Insofar as the Mississippi reapportionment plans were conclusively precleared by the Attorney General, any

action by the district court would have amounted to judicial review of the administrative approval. In *Morris* v. *Gressette*, 432 U.S. 491 (1977) this Court specifically held that the Attorney General's Section 5 determinations cannot be questioned in a suit seeking judicial review. 432 U.S. at 507.

As the *Morris* Court explained, administrative preclearance was intended to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions. Congress was concerned during the drafting and consideration of the Voting Rights Act that the time required to pursue a declaratory judgment would unduly delay the implementation of nondiscriminatory laws. In response to this concern, Congress included the alternative of preclearance by the Attorney General. Necessarily, the extraordinary remedy of postponing the implementation of a state's legislation was to cease once the Attorney General declined to object to a complete submission. Judicial review of the Attorney General's Section 5 decisions would defeat Congress' intent in providing the administrative alternative.

CONCLUSION

This appeal should be dismissed for want of jurisdiction. Alternatively, the order of the district court dismissing the action below and denying the appellants' motion to intervene should be affirmed.

Respectfully submitted,

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